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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MICHAEL J. MCMAHON, ART MALIN, STEVE AUSNIT,  
DONALD L. CREVIER, JOEL JOHNSON, and DAVID J. MATTHEWS

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Appeal 2008-1091  
Application 10/822,369  
Technology Center 3700

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Decided: May 29, 2008

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Before WILLIAM F. PATE, III, MURRIEL E. CRAWFORD, and  
JENNIFER D. BAHR, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Michael J. McMahon et al. (Appellants) appeal under 35 U.S.C. § 134  
from the Examiner's decision rejecting claims 34 through 46. Claims 1

through 33 have been cancelled. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

## THE INVENTION

The Appellants' invention is directed towards a process of making reclosable packages including feeding a supply of package film 82 off a roll 84 in a package forming direction, folding the package film about a bottom crease 83 to form opposing package walls 116, 118, and feeding a supply of interlocked reclosable zipper 36 (closure strip) off a roll 38 between the opposing package walls 116, 118 (Spec. 10, ll. 4-8 and figs. 12 and 15). The interlocked reclosable zipper 36 (closure strip) includes two interlocking profiles 39, 41 with extending flanges 40, 42 therefrom and a mounted slider 44, each slider being used to open and close the reclosable zipper (closure strip) (Spec. 5, ll. 21-22; Spec. 6, ll. 6-9; and fig. 19). As shown in Figure 19, the process further includes sealing a first portion of the flanges 40, 42 to the opposing package walls (element 82 in fig. 19) adjacent to the bottom crease, while leaving a second portion of the flanges free of sealing to the opposing package walls (Spec. 12, ll. 16-18 and fig. 19), and cross-sealing the folded film at package-width intervals to form a chain of packages (Spec. 10, ll. 14-15).

Claim 34, the only independent claim, is representative of the claimed invention and reads as follows:

34. A method of making reclosable packages, said method comprising the steps of:

feeding a supply of package film in a package forming direction;

folding said package film about a bottom fold to form opposing package walls, said opposing package walls advancing in said package forming direction;

feeding a supply of interlocked reclosable zipper between said opposing package walls, said interlocked reclosable zipper including two interlocking profiles with flanges extending therefrom and mounted sliders, each of said mounted sliders being adapted to open and close said reclosable zipper as said slider is moved along said reclosable zipper in opening and closing directions, respectively;

sealing a first portion of said flanges to said opposing package walls adjacent to said bottom fold with a second portion of said flanges free of sealing to said opposing package walls; and

cross-sealing said folded film at package-width intervals to form a chain of packages, each of said packages having a reclosable zipper and a slider.

## THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Herber	US 5,519,982	May 28, 1996
Gilbert	GB 2 085 519 A	Apr. 28, 1982

The following rejections are before us for review:

Claims 34-46 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 34-42 of copending Application U.S. Serial No. 10/208,494 in view of Herber.

Claims 34-46 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Herber in view of Gilbert or alternatively over Gilbert in view of Herber.

The Examiner provides reasoning in support of the rejections in the Answer (mailed January 25, 2007). The Appellants present opposing arguments in the Appeal Brief (filed December 4, 2006). A Reply Brief has not been filed.

## FACTS

### *Herber*

We make the following findings of fact with respect to Herber:

1. Herber discloses a process for making reclosable packages including providing a continuous roll 202 of polymeric web material 204 and a continuous roll of polymeric closure strip 208 (zipper) having an interconnected male component 210 with a flange portion 214 and a planar portion 222, and a female component 212 with a flange portion 216 and a planar portion 224 (col. 8, ll. 36-55 and figs. 18-19).
2. In a first stage, the closure strip 208 (zipper) is sealed to the web material 204 along the planar portion 222 of the male component 210 (col. 9, ll. 9-18).
3. In a second stage, the web material 204 is folded in half along the centerline 232 to bring opposing lateral edges 244 and 246 of the web material together (col. 9, ll. 58-64 and figs. 18-19) and then the closure strip 208 (zipper) is sealed along the planar portion 224 of the female component 212 to the web material 204 (col. 11, ll. 1-6).

4. Herber does not teach mounting a slider to the closure strip (zipper) and sealing a first portion of the flanges while allowing a second portion of the flanges to be free of sealing to the opposing walls of the reclosable package.

*Gilbert*

We make the following findings of fact with respect to Gilbert:

5. Gilbert discloses a process for mounting a slider 11 onto a closure strip 1 (zipper) prior to forming a reclosable package (Abstract and figs. 5-6).
6. Gilbert does not teach sealing a first portion of the flanges and allowing a second portion of the flanges to be free of sealing to the opposing walls of the reclosable package.

OPINION

*The obviousness-type double patenting rejection of claims 34-46*

In the Final Action dated June 28, 2006, claims 34 through 46 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting over claims 34-42 of copending Application U.S. Serial No. 10/208,494 in view of Herber. The Appellants have not furnished any substantive arguments against the Examiner's obviousness-type double patenting rejection. Therefore, we summarily affirm the Examiner's rejection of claims 34-46 under the judicially created doctrine of

obviousness-type double patenting over claims 34-42 of copending  
Application U.S. Serial No. 10/208,494 in view of Herber.

*The obviousness rejection of claims 34-46*

The Appellants argue the rejection under 35 U.S.C. §103(a) of claims 34 through 46 together as a group. Therefore, in accordance with 37 C.F.R. 41.37(c)(1)(vii) (2007), we have selected claim 34 as the representative claim to decide the appeal, with claims 35 through 46 standing or falling with claim 34.

We agree with the Examiner that Herber shows every feature of independent claim 34, except it does not teach mounting sliders to the zippers (closure strip) and sealing a first portion of the flanges while allowing a second portion of the flanges to be free of sealing to the opposing walls of the reclosable package (Findings of Fact 1-4). We further agree with the Examiner that Gilbert does not specifically teach sealing a first portion of the flanges while allowing a second portion of the flanges to be free of sealing to the opposing walls of the reclosable package (Findings of Fact 4 and 6). The Examiner relies on Gilbert to show a process for mounting sliders on a closure strip (zipper) (Finding of Fact 5). Specifically, the Examiner determines that it would have been obvious to modify the process of Herber by providing the sliders of Gilbert “to provide for a bag with an easy opening/closing mechanism” (Ans. 4). The Appellants, however, argue that Herber does not teach “sealing a first portion of the flanges to the opposing bag walls and a second portion of the flanges being free of sealing to the opposing bag walls” (Br. 4). The Appellants then

conclude that because in the process of Herber “the entire base of the profile is sealed to the walls,” when the slider of Gilbert is mounted to the closure strip (zipper) of Herber “the sliders would not be functional and the zipper profile would not be operational” (Br. 4).

We disagree with the Appellants’ argument because obviousness does not require that all of the features of the secondary reference be bodily incorporated into the primary reference *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Moreover, the artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment. *Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889 (Fed. Cir. 1984). In this case, although Herber does not specifically disclose a first sealed portion and a second unsealed portion, we agree with the Examiner that in order for the slider of Gilbert to properly function with the zipper (closure strip) of Herber, a user must have access to the slider to open and close the resulting reclosable package so as to permit relative motion between the slider and the zipper (closure strip). As such, we agree with the Examiner that only by “partial sealing [of] the zipper flanges to the film” can “relative movement between the slider and the zipper/bag” be achieved (Ans. 5). We find that it would have been an obvious matter of common sense to a person of ordinary skill in the art to partially seal the zipper flanges to the bag film in the process of Herber in view of Gilbert because to do otherwise would make the slider unusable with the zipper (closure strip). After all, “[a] person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR Int’l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1742 (2007).



The Appellants further contend that the Examiner has failed to identify any teaching of the desirability to combine Herber and Gilbert to arrive at the Appellants' invention (Br. 5). While there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness, "the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR*, 127 S.Ct. at 1741.

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

*Id.* at 1740. We must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.  
*Id.*

In this case, Herber teaches a process for making reclosable packages using a closure strip having interconnected male and female members (zippers) (Finding of Fact 1) and Gilbert teaches a process for attaching a slider to a closure strip (zipper) (Finding of Fact 5). An artisan must be presumed to know something about the art apart from what the references disclose. *See In re Jacoby*, 309 F.2d 513, 516 (CCPA 1962). A person of

ordinary skill in the art of reclosable packages would have understood that the function of the slider of Gilbert is to facilitate opening and closing of the zippers by the user. Hence, a person of ordinary skill in the art would have been prompted to use the process of Gilbert to mount sliders to the closure strip in the reclosable package forming process of Herber in order to provide a package with an easy opening/closing mechanism. Moreover, modifying the process of Herber to mount the slider of Gilbert would not have been uniquely challenging to a person of ordinary skill in the art because it is no more than "the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement." *Id.* at 1740. Therefore, the substitution appears to be the product not of innovation but of ordinary skill and common sense. When the improvement is technology-independent and the combination of references results in a product or process that is more desirable, an implicit motivation to combine exists even absent any hint of suggestion in the references themselves. "In such situations, the proper question is whether the ordinary artisan possesses knowledge and skills rendering him *capable* of combining the prior art references." *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006). A person of ordinary skill in the art would readily appreciate the benefits afforded to the reclosable package of Herber by providing the slider of Gilbert. Moreover, the Appellants do not provide any evidence to show that modification of Herber to provide the slider of Gilbert would have been beyond the technical grasp of a person of ordinary skill in the art. Therefore, we conclude that it would have been obvious to modify the Herber reference

by incorporating the slider attachment process of Gilbert to provide a bag with an easy opening/closing mechanism as proposed by the Examiner.

For the foregoing reasons, the Appellants' arguments do not persuade us the Examiner erred in rejecting claim 34 as unpatentable over Herber in view of Gilbert. Therefore, the rejection of claim 34, and claims 35 through 46 standing or falling with claim 34, is sustained.

### SUMMARY

The decision of the Examiner to reject claims 34 through 46 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 34 through 42 of copending Application U.S. Serial No. 10/208,494 in view of Herber is affirmed.

The decision of the Examiner to reject claims 34 through 46 under 35 U.S.C. § 103(a) as unpatentable over Herber in view of Gilbert or alternatively over Gilbert in view of Herber is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

### AFFIRMED

Appeal 2008-1091  
Application 10/822,369

hh

RONALD E. BROWN  
DAY PITNEY LLP  
7 TIMES SQUARE  
NEW YORK, NY 10036-7311